Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

WAYNE EVANS and MADELYN EVANS, husband and wife,
Petitioners,

v.

TOHONO O'ODHAM NATION; WILLIE GILBERT; DAWSON RILEY and DAVINA RILEY; HAROLD MARCONDA; LINDA MARTIN and JACK MARTIN; JEREMY EVANS; DANIEL EVANS; HUNTINGTON CONSTRUCTION, INC.; WESTERN PACIFIC CONSTRUCTION, INC.; and VOICE OF GOD RECORDINGS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal common law anti-marital fact privilege, by which a husband cannot be forced to be a witness against his wife in a civil case, nor a wife against her husband, still applies in civil cases, and particularly in the civil racketeering and fraud case pending against Petitioners and brought by the Respondent Tohono O'Odham Indian Nation.

2. Whether the District Court should have determined the anti-marital fact privilege of petitioners, for this case which predominated with state law claims, under Fed. R. Evid. 501, by resorting to the forum state's anti-marital fact privilege in a civil case, as established in Ariz. Rev. Stat. Ann. § 12-2231 (West. Ed. 1999).

LIST OF PARTIES

All parties are listed in the caption. There are no parent or subsidiary corporations to any of the corporate respondents.

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DECISIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit, March 9, 1999, denying Petitioners' application for a writ of mandamus to the United States District Court for the District of Arizona, Appendix A, is unreported. The Ninth Circuit did not issue a separate decision or opinion.

The order of the United States District Court for the District of Arizona, January 12, 1999, denying Petitioners' motion for a protective order, Appendix B, is unreported.

The order of the United States District Court for the District of Arizona, February 19, 1999, staying the effect of its order denying a protective order pending appellate review, Appendix C, is unreported.

The order of the United States District Court for the District of Arizona, April 9, 1999, continuing the stay of its order denying a protective order pending the filing of a Petition for Writ of Certiorari, Appendix D, is unreported.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit, denying Petitioners' application for a writ of mandamus, was entered on March 9, 1999. No motion for rehearing was filed.

Jurisdiction for a writ of certiorari from this Court is based upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Ariz. Rev. Stat. Ann. § 12-2231 provides:

> "In a civil action a husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, except as provided in paragraphs 1 through 4 of § 12-2232." [The exceptions do not apply to this case.]

STATEMENT OF THE CASE

This action was brought by the Tohono O'Odham Indian Nation, situated in Arizona, against Petitioners Wayne and Madelyn Evans, husband and wife, and against the remaining Respondents. The essence of the allegations of the Nation's complaint against Petitioners is that large sums of money were wrongfully paid, at their instigation,

to Respondents Huntington Construction Inc. and Western Pacific Construction, Inc., in connection with rehabilitation of the Nation's San Lucy Farm from a flood emergency in 1993.

Respondent, Tohono O'Odham's (the "Nation's") Amended Complaint in this action is a broad-based accusation of wrongdoing by Petitioner Wayne Evans during an employment with the Nation, and accuses each of the other parties to this action of complicity with him.

Mr. Evans' wife, Petitioner Madelyn Evans, was joined as a defendant and as discovery has proceeded, it is apparent that the Nation is pursuing her as a participant in allegedly fraudulent misconduct. As reported to the district court, her name is found on many documents gathered as evidence in this case. Respondents Linda Martin and her husband are Wayne Evans' sister and brother-in-law. Respondents Jeremy Evans and Daniel Evans are the sons of Petitioners Wayne and Madelyn Evans. These family members are accused of participating in fraudulent conduct. Respondent Western Construction, Inc. is an Evans family-owned small construction company. Respondent Huntington Construction, Inc., is a small private construction company owned by acquaintances of the Petitioners, and for which Petitioner Evans and other family members worked. It is said by the Amended Complaint to be the primary vehicle or instrumentality of the alleged fraudulent conduct.

Prosecution of the Nation's claim will necessarily require delving into various areas which accuse Defendants Wayne Evans and Madelyn Evans of criminal conduct. Counts One and Two of the Amended Complaint implicate numerous issues of criminal conduct, including following:

- Fraud (Ariz. Rev. Stat. Ann. § 13-2301(D)(4) (t), (d), (e), (z); § 13-2310). Amended Complaint ¶¶ 88, 90, 96.
- Racketeering (18 U.S.C. § 1962(a)-(d)). Amended Complaint ¶¶ 88, 89.
- Use of interstate mail in fraud (18 U.S.C. § 1341) and racketeering. Amended Complaint ¶¶ 38, 88, 90.
- Use of interstate telephone in fraud (18 U.S.C. § 1343 and racketeering. Amended Complaint ¶¶ 88, 90.
- Interstate transport of stolen property under 18 U.S.C. § 2315. Amended Complaint ¶ 91.
- Forgery with intent to conceal Defendants' involvement with a specific corporation, including the issue of what is the corporation and Defendants' proper address. Amended Complaint ¶¶ 37, 89, 90.
- Conversion. Amended Complaint ¶ 102.

The Nation's Amended Complaint explicitly avers that Petitioners' conduct was criminal. Amended Complaint ¶ 93.

The jurisdiction of the District Court was based in the complaint upon 28 U.S.C. § 1331 and 18 U.S.C. § 1964 (c). The additional counts arising from Arizona law were based upon "pendent [sic] jurisdiction." Amended Complaint ¶ 18.

On November 15, 1998, Petitioners learned that the Nation was purposefully and regularly relaying information obtained from the Petitioners and remaining Responents in discovery, including deposition transcripts and documents, to the FBI; and that the FBI had apparently been actively investigating the Defendants, and had inter-

viewed at least one party to the action. On November 20, 1998, five days later, Petitioners filed a motion for a protective order with the district court.

Petitioners informed the district court that they were likely the targets of an FBI investigation, and sought a protective order under Rule 26 FED. R. CIV. P. Petitioners claimed their Fifth Amendment privilege against self-incrimination, the federal common law anti-marital fact privilege, and the Arizona anti-marital fact privilege. In their Motion for Protective Order,[1] Petitioners argued that because of the predominance of state law claims in the case, and the fact that jurisdiction of the District Court was based upon 18 U.S.C. § 1964(c) (racketeering), that even though some district and circuit courts had recently opined that the anti-marital fact privilege should not be recognized in civil cases in the United States courts, that the very clear mandate of the State of Arizona, as expressed in Ariz. Rev. Stat. Ann. § 12-2231, that the anti-marital fact privilege must be recognized in "all civil cases," that the District Court should recognize and apply it in this case.

Petitioners supported their application for a protective order with affidavits confirming to the court that they had been married to each other for many years; that theirs was a warm and loving marriage that they expected to endure, and that each would claim the anti-marital fact privilege if they were called to give deposition or other testimony in the case. Affidavits of Wayne and Madelyn Evans, Nov. 20, 1998.

The Respondent Nation, in opposing the motion for a protective order in the District Court, contended that the

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1 Defendants' Motion for Protective Order Regarding the Depositions of Wayne Evans and Madelyn Evans, Nov. 20, 1998 p. 4 (hereinafter "Motion").

federal courts declined to recognize the privilege in civil cases, and urged the Court to deny Petitioners' motion. While acknowledging Fed. R. Evid. 501 specified that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law," the Respondent Nation argued that in cases involving both federal question claims and pendent state law claims, privileges are governed by federal law.[2]

Petitioners, in reply to the District Court, pointed out that this Court had recognized an anti-marital fact privilege in *Stein v. Bowman*, 38 U.S. (13 Pet.) 209 (1839). They advised the court that while (as discussed in detail *infra*), this Court has refined the nature and application of this privilege in criminal cases, *Stein* has never been modified, overruled, or criticized in its application to civil cases. They pointed out to the district court the lack of substantiality of several cases that the Nation had cited to the district court for the proposition that no anti-marital fact privilege was applicable to witnesses in a civil case.[3] They also argued to the district court that under Rule 501, Fed. R. Evid., it was appropriate to turn to the Arizona anti-marital fact privilege statute and apply it in this case having claims based on federal law, and claims under supplemental jurisdiction arising out of the law of Arizona. Reply, pp. 7-9. Respondents urged the district court to utilize the analytical approach applied by

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[2] Tohono O'Odham Nation's Response to Defendants' Motion for Protective Order, November 27, 1998, p. 7. The Nation cited two district court opinions for this proposition, *United States v. State of Illinois*, 148 F.R.D. 587 (N.D. Ill. 1993); *Engelmann v. National Broadcasting Company*, 1995 WL 24500 *2 (S.D.N.Y. 1995).

[3] Defendants' Reply to Plaintiff's Response to Defendants' Motion for Protective Order . . . Dec. 3, 1998, pp. 2-7.

the District of New Hampshire in *Smith v. Alice Peck Day Memorial Hospital*, 148 F.R.D. 51 (D.N.H. 1993), by which the intrinsic importance to the institution of marriage, and the demonstrated importance attached by Arizona to the anti-marital fact privilege as evidenced by its clear adoption in Ariz. Rev. Stat. Ann. § 12-2231, pointed to recognition and application of the privilege in this case. *Ibid.*

The district court denied the motion. It concluded as a matter of law that no anti-marital fact privilege existed which was available to Petitioners.[4] The court acknowledged that this Court had long ago recognized and applied the anti-marital privilege in a civil case, *Stein v. Bowman*, 38 U.S. (13 Pet.) 209 (1839). The court observed that the privilege recognized in *Stein* was broad, and that this Court had narrowed it over the years, "but only in the context of criminal cases." App. B, p. 6a. Notwithstanding that the foregoing analysis implies that the *Stein* privilege remains broad to this day in civil cases, the district court concluded instead that "there is no general anti-marital fact privilege in a federal civil case." *Id.* at 7a. The district court cited two district court cases for the proposition that no anti-marital fact privilege applied. *id.* at 6a, and cited two circuit court opinions as establishing that generally the privilege applies only in criminal cases, but that it might be extended in a civil case, on a case-by-case basis. *Id.* p. 7a. The district court did not discuss the circumstances of the instant case for possible application of a case-by-case privilege; nor did it deal

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4 The District Court denied Petitioners' motion to recognize their Fifth Amendment rights by entirely precluding the taking of their depositions, recognizing that this privilege must be claimed on a question-by-question basis. Petitioners did not seek review in the Ninth Circuit, of that portion of the District Court's ruling on Petitioners' motion for protective order; and it is not before this court.

at all with Petitioners' contention that the Arizona anti-marital fact privilege should apply to this case.

Petitioners filed an Application for Stay with the district court, pending the filing of an application for a writ of mandamus in the court of appeals. The district court granted the stay, "acknowledg[ing] that Defendants may well suffer irreparable harm if required to disclose information later determined to be privileged." Order, Feb. 23, 1999, App. C, p. 9a.

Within thirty days of the decision by the District Court refusing protective relief based upon the anti-marital fact privilege, Petitioners filed an application for a writ of mandamus in the United States Court of Appeals for the Ninth Circuit. On March 9th, 1999, a panel of the Ninth Circuit denied the petition, concluding that "Petitioners have not demonstrated that this case warrants the intervention of the court by means of the extraordinary remedy of mandamus." App. A. There is, of course, no other adequate remedy to Petitioners for review by the Court of Appeals of rejection by the district court of their claim of the anti-marital fact privilege.

The District Court has extended its stay pending any action by this Court on a petition for writ of certiorari this term, App. D, and this prompt petition followed.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit refused to remedy the decision in a case in which the district court flatly rejected the existence of the anti-marital fact privilege in a civil case, even though such a ruling was squarely in conflict with this Court's long-established holding in *Stein v. Bowman*, 38 U.S. (13 Pet.) 209 (1839). The Ninth Circuit's inaction was the more erroneous in light of the district court ruling's conflict with numerous other and much more recent

cases from this Court recognizing the principle of *Stein* and the importance of an anti-marital fact privilege even in the criminal case context, where the need for "every man's evidence" would normally more strongly outweigh the privilege than here, in a civil case.

The Ninth Circuit's rejection of Petitioners' application for mandamus continues a trend by other circuit and district courts to bury this privilege, by poorly reasoned, unsupported opinions, and, as here, inaction in the face of clearly controlling precedent from this Court.

The Ninth Circuit's rejection of Petitioners' application for mandamus lends further encouragement for the unwise and unworkable hypothetical basis for a possible anti-marital fact privilege in a civil case, alluded to by the district court in this case, and expressed in other circuit and district court cases—that perhaps a privilege exists in civil cases, but only on a case-by-case basis. Such a rule departs from sound principles of privilege law, which are designed to protect important societal interests beyond the courts; here, support for the institution of marriage by protecting spousal harmony and trust. An *ad hoc* application of a marital privilege, as suggested by some cases and allowed by the Ninth Circuit's inaction to take further root, would not accomplish that purpose.

Finally, the Ninth Circuit's sanction of the district court's disregard of the Congressionally mandated Federal Evidence Rule 501, requiring district courts to resort to state privileges for claims arising from state law, in this predominantly state-law case, should be reviewed because of the snub to important issues of federalism inherent in the district court's decision.

The Petitioners' application to the Ninth Circuit was prompt, was the only realistic method of obtaining effective review of an interlocutory ruling on privilege, the

important protection of which would be lost if interlocutory review by special writ were not invoked.

I. THIS COURT SHOULD REVIEW THIS CASE TO CORRECT A GROWING BODY OF POORLY SUPPORTED AND REASONED CASELAW REJECTING A FEDERAL COMMON LAW ANTI-MARTIAL FACT PRIVILEGE.

Petitioners sought to avail themselves of the federal common law privilege against adverse spousal testimony (or "anti-marital fact privilege") recognized by this Court in *Stein v. Bowman*, 38 U.S. (13 Pet.) 209 (1839). In *Stein*, a civil probate case, this Court held that a wife "cannot testify for or against [her husband] in a suit in which he is a party, or interested." *Id.* at 223. The *Stein* Court clearly meant all actions, both *civil* and criminal, when it made this statement. In *Funk v. United States*, 290 U.S. 371 (1933) this Court recognized that the disqualification of witnesses with a personal interest had previously been abolished, and as such, it was proper to allow spouses to testify on behalf of each other in criminal cases. *Id.* at 386. The *Funk* decision contains no language regarding civil cases. In *Hawkins v. United States*, 358 U.S. 74 (1958) this Court refused to alter the portion of the *Stein rule* which prohibits spouses from testifying *against* each other in criminal cases. ("[T]he law has refused to pit wife against husband or husband against wife in a trial.") *Hawkins* contains no specific language regarding civil cases, but discusses at some length the rule as one of common law, not only criminal law, 358 U.S. at 77-79. In *Trammel v. United States*, 445 U.S. 40 (1980), this Court held that the witness spouse alone holds the privilege in criminal cases. As it had in *Funk* and *Hawkins*, *supra*, this Court discussed criticisms of the privilege, but recognized the societal interest in bolstering the institution of marriage by buttressing the trust and

confidence of spouses in each other. It observed that "the long history of the privilege suggests that it ought not to be casually cast aside. That the privilege is one affecting marriage, home, and family relationships—already subject to much erosion in our day—also counsels caution." 445 U.S. at 48. The foregoing observation is at least as accurate an assessment of the modern status of the institution of marriage as it was when *Trammel* was written. The *Trammel* court's adjustment of the privilege was predicated on a conclusion that "When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve." *Id.* at 52. Such is not this case.

In these cases, this Court has made it clear that, notwithstanding considerable criticism of the anti-marital fact privilege, and although this Court has adjusted it in criminal cases over the years, *Stein* remains a vital precedent regarding the existence of an anti-marital fact privilege that is available in civil actions.

Subsequent to *Stein*, this Court has not had occasion to directly address the use of the anti-marital fact privilege in a civil-case context. However, the Court cited *Stein* approvingly in *Hodgsen v. Minnesota*, 497 U.S. 417, 448 n. 33 (1990) ("[T]he married couple has a well-recognized interest in protecting the sanctity of their communications from undue interference by the State."). Most significantly, this Court implicitly reaffirmed the privilege in a 1996 *civil* case dealing with the psychotherapist-patient privilege. In *Jaffee v. Redmond*, 518 U.S. 1 (1996), which took up the question of whether or not a new federal psychotherapist-patient privilege should be recognized under Rule 501, FED. R. EVID. Drawing frequent analogies to the post-*Trammel* antimarital fact priv-

ilege, this Court found that any privilege must not serve only private, but also public ends, "[a]nd the spousal privilege, as modified in *Trammel*, is justified because it furthers the important public interest of marital harmony." *Id.* at 11.

In light of the great deference given by this Court to the privilege, and its *caveat* that the privilege is not to be casually discarded, any conclusion that *no* anti-marital fact privilege is to be recognized in a civil case should be reached, if at all, only by this Court. This is especially true when it is recognized that the lower courts have given no careful, thoughtful analysis to the subject of re-examining the privilege for civil cases.

In support of its claim that the anti-marital fact privilege is no longer good law, the Nation cited below a Second Circuit case, and its underlying district court opinion, another New York District Court decision, and a New York Bankruptcy Court opinion. Examination of these cases reveals that they are based on no persuasive authority, merely parroting other unsupported sources, or syllogistically relying on each other. *United States v. Premises Known as 281 Syosset Woodbury Road*, 71 F.3d 1067 (2nd Cir. 1995), addressed the specific issue of whether the anti-marital fact privilege should be recognized in a civil forfeiture case. *Id.* at 1070. The *Syosset* court's entire address of the application of the anti-marital fact privilege to civil cases is contained in the following *dictum*: "[t]he adverse spousal testimony privilege has traditionally been limited to criminal cases." In support of this statement, *Syosset* cites two cases, one treatise, and one student law review note. *Id.*

The first case cited by *Syosset* is *Appeal of Malfitano*, 633 F.2d 276 (3rd Cir. 1980). The *Malfitano* case featured the successful invocation of the anti-fact marital

privilege by a wife testifying before a grand jury investigating an uncharged co-conspirator of her husband. *Malfitano* at 277. The *Malfitano* court did not address the exercise of the privilege in a civil case, stating only that "[t]he crux of this privilege is that a person may not be forced to be a witness against his or her spouse in a criminal proceeding." *Id.* The *Malfitano* court did, however, add that '[t]he main rationale for the privilege today is that it protects the marriage from the discord that occurs when one spouse testifies against the other," *id.*, a statement that is equally applicable in the civil situation. Regarding the application of an anti-marital fact privilege to civil cases, *Appeal of Malfitano* is not a reasoned case, and it does not hold that the anti-marital fact privilege is not applicable in civil actions.

The second case cited by *Syosset* and by the Court below, is *Ryan v. Commissioner of Internal Revenue*, 568 F.2d 531 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). In *Ryan*, the Seventh Circuit Court of Appeals states that "[w]e acknowledge that an argument can be made that no policy supports the distinction between allowing the privilege against adverse spousal testimony in criminal cases but not civil cases." *Id.* at 544. The *Ryan* court then goes on to state that "[n]evertheless, it is not necessary to fully defend the civil-criminal distinction in order to reject the marital privilege in this case. The independent policy reasons lead us to conclude that it should not be recognized here." *Id.* However, those "policy reasons" seem to be an overriding policy of "full enforcement of tax laws," *id.* at 543; a reliance on Proposed Evidence Rule 505 (which Congress rejected in favor of its own Evidence Rule 501 leaving privileges to judicial determination "in light of reason and experience"). *id.* at 543-44, and an unexplained conclusion that the privilege should be limited to where the spouse is neither "vic-

tim nor participant." *Id.* at 544. *Ryan* preceded *Hawkins*, and in *Hawkins* this Court rejected most of the policy arguments *Ryan* rested upon.[5]

Syosset cites two secondary sources for the proposition that the anti-marital fact privilege does not apply to federal issue civil cases. The first is WEINSTEIN'S EVIDENCE ¶ 505[05], at 505-41 (1995). The only reference to a criminal/civil dichotomy regarding the anti-marital fact privilege in WEINSTEIN'S is the phrase "it does not apply in a civil case." JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, § 505.05[3] (2d ed. 1998). No case law authority whatsoever is cited in support of this statement, nor does WEINSTEIN'S provide any scholarly analysis or even refer to other secondary sources supporting this conclusion. WEINSTEIN'S must be rejected as a source of authority for the notion that the privilege no longer applies in the civil context.

Syosset further cites a student note, *Developments In the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1570 (1985) (hereinafter "Note"). The sole discussion of any criminal/civil dichotomy regarding the anti-marital fact privilege in the Note is the statement that "[m]ost jurisdictions, including federal courts, allow the adverse testimony privilege to be invoked only in criminal proceedings." *Id.* at 1570. The Note cites two other secondary sources in support. *Id.* at n. 55. Neither source offers case law positively showing that the anti-marital fact privilege is not applicable in civil cases. The Note further cites to *In re Grand Jury Matter*, 673 F.2d 688,

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[5] A further comment on the quality of the *Ryan* decision is its statement at 541-542 that "[b]y its own terms, [the Fifth Amendment] applies only to criminal cases." *Compare, Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964) ("[t]he [Fifth Amendment privilege] can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigative or adjudicatory.")

691 (3rd Cir. 1982) (quoting *Malfitano*, 633 F.2d at 277) (stating merely "that in *Trammel* the Supreme Court had 'decided that the privilege against adverse spousal testimony remains a viable principle of federal law and only modified the privilege by vesting it solely in the testifying spouse.' "). Accordingly, the Note provides no scholarly or case law assistance regarding the application of the anti-marital fact privilege to civil cases. In conclusion, as it relates to the application of the anti-marital fact privilege to civil cases, the *Syosset* decision is not well-reasoned and provides no discredit to the federal common law's recognition of an anti-marital fact privilege in civil cases.

As to additional cases cited by the Nation, *Engelmann v. National Broadcasting Co.*, 1995 WL 214500 (S.D. N.Y.) relies upon *Hawkins*, *Ryan*, and *Syosset*, cases already addressed *supra*. *In re Shur*, 225 B.R. 295 (Bkrtcy. E.D.N.Y. 1998) quotes *Syosset* for the proposition that the anti-marital fact privilege is limited to criminal matters. *Id.* at 300 (quoting *Syosset*, 71 F.3d at 1070). The notion that there is no longer a privilege for civil cases appears to be a weed that has grown up in the law, sorely needing to be pulled, or at the very least legitimized by this Court.

The district court analysis of this supposed rule consisted of a statement that the decision in *Stein* "allowed for a broad privilege, which the Supreme Court has narrowed over the years, but only in the context of criminal cases." App. B, p. 6a. The district court followed this observation with a quotation from *Hawkins* and the following cursory analysis: "In *Hawkins*, the Supreme Court looks at the policy underlying the rule, without mentioning civil actions, and examines only why the rule refuses to "pit wife against husband or husband against wife in a trial where *life or liberty is at stake.*" (emphasis sup-

plied by district court). Given that *Hawkins* was a criminal case, that descriptive phrase is understandable, but hardly a linchpin upon which to rest an abrogation of the privilege in civil cases.

II. THIS COURT OUGHT TO REVIEW THIS CASE, ADDITIONALLY, IN ORDER EITHER TO DISAPPROVE OR TO VALIDATE AN *AD HOC* ANTI-MARITAL FACT PRIVILEGE IN CIVIL CASES, AS SUGGESTED BY SOME LOWER COURTS.

Taking a cue from *Syosset, supra,* 71 F.3d at 1070 and *Ryan, supra,* 568 F.2d 531, the district court concluded that a privilege might be found under the particular facts of a given case, but that the facts in this case did not warrant an extension of the anti-marital fact privilege to Petitioners. App. B, p. 7a. What facts did or did not support this conclusion were not described.

As we have already argued, *supra,* this case, along with *Syosset* and *Ryan* demonstrate the need for this Court to reaffirm *Stein* and to do so on a categorical basis. Inasmuch as privileges are designed to further societal values extrinsic to the court system, the judicial recognition of privileges needs be very precise, so that the message is clear. For the anti-marital fact privilege, the message is that the marital relationship is important; that spousal trust and harmony is to be sedulously fostered; and that spouses can count on the fact that pitting one against another by forcing her involuntarily to testify against her spouse will not happen. Therefore, the prospect of an anti-marital fact privilege having a problematic existence, depending upon in what situation a given district court deems it to be warranted, would seem entirely unsatisfactory.

However, if ultimately it were to be determined that, for some reason, the privilege ought to be less than com-

plete in civil cases, then this Court ought to say so, and provide some guidance to the lower courts on what it is that qualifies one case, or one marriage, for such treatment, and not another. This case is ideally suited for such a consideration.

The district court noted *Syosset's* observation that perhaps the privilege might be extended in civil actions that might be considered "quasi criminal." App. B, p. 7a, quoting *Syosset* at 71 F.3d at 1070. If the fact that a case is quasi criminal, or otherwise portends unusually serious difficulty or financial jeopardy for a party-spouse, might be the determinant, this is such a case. The claims themselves seek penal trebling of damages, a virtual declaration of criminal wrongdoing, and to pin the badge of civil fraud and dishonesty on the Petitioners. Moreover, the added circumstance that the Respondent Nation is actively supporting a criminal investigation of Petitioner Evans by the Federal Bureau of Investigation, feeding the fruits of its investigation and of the discovery conducted in this case to it, is surely of added significance.

This case is also suitable if guidance is to be drawn from the statement in *Trammel, supra,* that the defendant husband in a criminal case cannot claim the privilege if the wife wishes to testify, because "the relationship is almost certainly in disrepair," *Trammel, supra,* 445 U.S. at 52. These Petitioner-spouses have a long-standing marriage which is not in jeopardy. If an anti-marital fact privilege is appropriate for any marriage in a civil case, this is one of them.

This case also squarely presents the privilege issue. Although the Ninth Circuit chose merely to conclude that this case was not one in which it chose to intervene with the extraordinary writ of mandamus, there can be no doubt that its decision was not grounded on any peripheral

concerns. Petitioners have timely raised the issue. They filed for protective order relief in the district court five days after learning that the Nation was collaborating with the FBI in criminally investigating them. They promptly sought mandamus relief in the Ninth Circuit. Their petition was filed within the thirty days that would have governed the time for taking an appeal. And the procedure of mandamus invoked by the Petitioners was the appropriate means to test the district court's ruling. *Admiral Ins. v. United States Dist. Ct. For Dist. Of Ariz.*, 881 F.2d 1486, 1491 (9th Cir. 1989) (In light of irreparable injury to civil litigant ordered to make discovery of privileged information, not redressable on appeal from final judgment, and because civil contempt not generally appealable, mandamus is proper method for review of orders compelling discovery in face of assertions of absolute privilege.).

We reiterate that this Court should reject the notion that an anti-marital fact privilege is an on-again, off-again situation in civil cases; but rather should be recognized across-the-board. But whatever might be the final result, this case is a very proper vehicle to address the issue.

III. REVIEW IS NECESSARY TO ESTABLISH THE PROPER MANNER TO IMPLEMENT THAT PORTION OF CONGRESSIONALLY-DRAFTED EVIDENCE RULE 501 REQUIRING APPLICATION OF STATE LAW PRIVILEGE TO CLAIMS GOVERNED BY STATE LAW, IN A CASE ALSO CONTAINING FEDERAL LAW CLAIMS AS TO WHICH A FEDERAL PRIVILEGE DOES NOT EXIST.

In this case one claim arises under the federal anti-racketeering act, 18 U.S.C. § 1962. The remaining claims, arising under Arizona racketeering statutes, Ariz. Rev. Stat. Ann. §§ 13-2301, 2310, and Arizona common law fraud and conversion, are included under supplemental

jurisdiction. If the conclusion of the courts below, refusing to find a federal anti-marital fact privilege, are affirmed or let stand, a dilemma applies. It stems from the provisions of Fed. Evid. R. 501, which specifies that:

> "[privileges] shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, . . . shall be determined in accordance with State law."

Fed. R. Evid. 501.

If the *Stein* federal common law anti-marital fact privilege is eliminated, then a literal application of Rule 501 would dictate that no privilege shields these Petitioner-spouses for litigation of the one federal, racketeering claim in this case. However, Arizona has a strong anti-marital fact privilege applicable to a civil case:

> "In a civil action a husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, except as provided in paragraphs 1 through 4 of § 12-2232." [The exceptions do not apply to this case.]

Ariz. Rev. Stat. Ann. § 12-2231 (West. Ed. 1999). Therefore, as to the remaining claims of the complaint in this case, Rule 501's literal application required the district court to adopt the Arizona privilege. This the district court did not do. Indeed, it did not deal with the isue at all; nor did the Ninth Circuit require the district court to do so.

Evidence Rule 501 was written by Congress to substitute for a set of privilege rules drafted by the Judicial

Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and by this Court. *Trammel v. United States, supra*, 445 U.S. at 47. The fact that Congres saw fit to play such a substantial role in what is normally a much more perfunctory oversight function under the Federal Rules Enabling Act, 28 U.S.C. §§ 2072-74, speaks to the importance of this case, and its suitability for review by this Court. Indeed, the nature of Congress' action on Rule 501, which this Court has recognized was intended to provide the courts with the flexibility to develop rules of privilege, *Trammel, supra*, 445 U.S. at 48, underscores the importance that this Court determine whether or not "reason and experience" dictate reaffirmation of the *Stein* rule. That is to say, two of the three branches of the government, this Court and Congress, have emphasized the importance of the proper development and application of the law of privilege in the United States Courts.

In light of Congress' adoption of the express language in Rule 501, requiring the borrowing of privileges from state law when claims arising under state law are brought in federal cases, the spurning of that issue by the lower courts is an important dereliction.

Petitioners asked the district court to adopt the approach to the above-described dilemma that had been used by the district court in *Smith v. Alice Peck Day Memorial Hosp.*, 148 F.R.D. 51 (D.N.H. 1993), and by other courts as cited in *Smith*. The court in *Smith* noted that:

> "if a communication were privileged under state law, but not under federal law, [or vice versa], it would be meaningless to hold the communication privileged for one set of claims but not for the other. Once confidentiality is broken, the basic purpose of the privilege is defeated."

148 F.R.D. at 53, quoting *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 458 (N.D. Cal. 1978). The *Smith* court thereupon undertook to determine whether the state privilege should be incorporated under the main "common-law as dictated by reason and experience" portion of Evidence Rule 501. It engaged in a balancing test, essentially weighing the importance of the claimed privilege to the state, as well as whether the privilege is intrinsically meritorious in the federal court's judgment. 148 F.R.D. at 54.

The approach taken in *Smith* is hardly a full-strength application of Congress's dictate to apply state privileges for claims arising under state law. It may be the best reasonable interpretation and application of that portion of Evidence Rule 501 that is available in the very common instance of cases having claims arising under both federal and state law. This Court ought to decide whether the *Smith* approach, or some other means of harmonizing the two parts of Rule 501, should be used to determine and apply privileges in cases having dual-jurisdiction claims. At the very least, it should tell the Ninth Circuit that it cannot let district courts treat the second half of Evidence Rule 501 like a dead letter.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Mar. 10, 1999]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99-70161

DC# CV-97-555-WDB
(Arizona (Tucson)

IN RE: WAYNE EVANS; *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA,
Respondent,

TOHONO O'ODHAM NATION; *et al.*,
Real Parties in Interest.

Before: SNEED, KOZINSKI and LEAVY, Circuit Judges

ORDER

Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

APPENDIX B

[Filed Jan. 12, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 97-555-TUC-WDB

TOHONO O'ODHAM NATION,
Plaintiff,

v.

WAYNE and MADELYN EVANS, WILLIE and JANE DOE GILBERT, DAWSON and JANE DOE RILEY, HUNTINGTON CONSTRUCTION, INC., WESTERN PACIFIC CONSTRUCTION, INC., VOICE OF GOD RECORDINGS, INC., HAROLD MARCONDA, LINDA and JOHN DOE MARTIN, JEREMY EVANS, and DANIEL EVANS,
Defendants.

ORDER

Pending before the Court is Defendant Evans' November 20, 1998 Motion for Protective Order Regarding Depositions of Wayne Evans and Madelyn Evans. The motion is fully briefed and oral argument was heard on December 15, 1998.

FACTUAL BACKGROUND

The primary allegation in this case against Wayne Evans is that while he was working as the manager of the Tohono O'odham Farming Authority he authorized the payment of funds to corporations which he controlled, for work which those corporations did not perform for the

Farming Authority. Plaintiff also alleges that he made many other unauthorized transfers of funds, such as to his children and to pay his car insurance, that he funneled funds through his corporations to pay off his mortgage, as well as transferring vehicles that belonged to the Farming Authority to his children. Plaintiff asserts the following claims against Evans: (a) Federal Rico; (b) Arizona Racketeering; (c) Conversion; (d) Constructive Trust; (e) Breach of Contract; and (f) Breach of Fiduciary Duty.

The parties are in agreement that the FBI has been receiving information about the case from Plaintiff, although they dispute the time at which Defendants became aware of this. Due to the possibility of criminal liability, Defendants Wayne and Madelyn Evans request that the Court preclude Plaintiff from deposing them.

DISCUSSION

Fifth Amendment Privilege Against Self Incrimination

Defendants seek a protective order precluding their depositions, because it will subject them to annoyance, oppression and undue expense, in that it will place them in danger of incriminating themselves, will prove futile and will not provide admissible evidence or lead to admissible evidence. If depositions are held, Defendants intend to invoke their privilege against self-incrimination and will refuse to answer all questions after a request for their proper names. Defendants acknowledge that traditionally a civil deponent must invoke the privilege with respect to each question in a deposition, however, due to the fact that the privilege will apply to all questions, the Court should preclude the entire deposition. Plaintiff does not dispute Defendants' right to invoke their privilege against self-incrimination, but Plaintiff asserts that a party must

do it with respect to each question allowing a Court to determine if it is properly invoked. Plaintiff wants to go forward with the depositions, which they argue are not futile, because in a civil case an invocation of the Fifth Amendment privilege may form the basis of a negative inference against the deponent.

The Ninth Circuit has held that district court has broad discretion in determining whether to completely bar a deposition from going forward. *See In Re Master Key Litigation*, 507 F.2d 292, 294 (9th Cir. 1974). Although the Fifth Amendment privilege may be invoked in a civil action, *see United States v. Flores*, 729 F.2d 593, 597 (9th Cir. 1983), there is no constitutional requirement that civil proceedings be stayed for a criminal case. *See Keating Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1994). A court should consider the specific circumstances of a case and how substantially the person's Fifth Amendment rights are implicated, as well as the following factors: (1) prejudice to plaintiffs from any delay and their interest in rapid proceedings; (2) burden proceedings may impose on Defendants; (3) court convenience with respect to case management and efficiency; (4) non-party interests; and (5) public's interest in the civil and criminal cases. *Id.* at 324-25. There is currently no criminal case pending nor is there a set time at which it will be clear whether there will ever be a criminal case, thus, any delay in the taking of the depositions would be indefinite. Looking to the circumstances of the case, the Court will deny Defendants' request for a protective order. Defendants alternatively requested at the hearing that the Court delay the depositions until the end of discovery, which currently concludes on February 26, 1999. The parties are already near the end of discovery, but the Court will allow the parties the full amount of discovery time left to complete the depositions.

It is not sufficient for Defendants to make a blanket assertion of their Fifth Amendment privilege. *See Industrial Indemnity Co. v. Niebling*, 844 F.Supp. 1374, 1377 (D. Az. 1994). The Court cannot rule on the propriety of the invocation of the privilege unless Defendants provide a foundation for it and assert it with particularity. *Id.* "The only way the Fifth Amendment can be asserted as to testimony is on a question-by-question basis." *United States v. Bodwell*, 66 F.3d 1000, 1001 (9th Cir. 1995). Defendants attempt to circumvent this rule by arguing that they have made a sufficient showing of possible incrimination from anything that might be asked, based on the particularity with which the Complaint is plead and that the Complaint alleges that Defendants engaged in criminal behavior. Although Defendants may be able to show that each question is incriminating if Plaintiff challenges the invocation of the privilege, it is inappropriate for the Court to make that decision in advance of the privilege being invoked. It is for a court to decide whether the privilege is justified, and that cannot be done until Plaintiff has a chance to challenge the invocation of the privilege in a particular instance. *See Hoffman v. United States*, 341 U.S. 479, 486 (1951).

The Court finds that Plaintiff may proceed with the depositions of Wayne and Madelyn Evans. If Defendants wish to invoke their Fifth Amendment privilege against self-incrimination they must do so with respect to each question asked.

Anti-Marital Fact Privilege

Defendants argue that there is an anti-marital fact privilege applicable in this case, which Defendants may invoke to prevent answering deposition questions. Plaintiff contends that the anti-marital fact privilege is not recognized in federal civil proceedings.

When jurisdiction is based on a federal question, as opposed to diversity, the federal common law governs the action with respect to privileges. *See* Fed.R.Evid. 501; *Heathman v. United States District Court for the Central District of California*, 503 F.2d 1032, 1034 (9th Cir. 1974). Both the Supreme Court and the Ninth Circuit have recognized that in a criminal proceeding against one spouse a marital privilege is held by the other potential witness-spouse, such that they "may be neither compelled to testify nor foreclosed from testifying." *United States v. Ramos-Oseguera*, 120 F.2d 1028, 1042 (9th Cir. 1997) (quoting *Trammel v. United States*, 445 U.S. 40, 53 (1980)). This rule applies only to adverse testimony, and does not create a blanket privilege from any testimony. *See Trammel*, 445 U.S. at 53. Defendants rely on an 1839 Supreme Court case which applied the privilege in a civil probate case. *See Stein v. Bowman*, 38 U.S. 209 (1839). That decision allowed for a broad privilege, which the Supreme Court has narrowed over the years, but only in the context of criminal cases. *See Trammel*, 445 U.S. at 40; *Hawkins v. United States*, 358 U.S. 74 (1958); *Funk v. United States*, 290 U.S. 371 (1933). In *Hawkins*, the Supreme Court looks at the policy underlying the rule, without mentioning civil actions, and examines only why the rule refuses to "pit wife against husband or husband against wife in a trial where *life or liberty is at stake.*" *Hawkins*, 358 U.S. at 77 (emphasis added). Defendants do not cite, nor is the Court aware of, any federal case that has applied the privilege in a civil case since *Stein*.

Plaintiff relies primarily on two New York district court cases that did not apply the privilege in a civil context. *See Engelmann v. National Broadcasting Co.*, 1995 WL 214500, *2 (S.D.N.Y. 1995); *United States v. Premises Known as 281 Soysset Woodbury Road*, 862 F.Supp. 847,

851 (E.D.N.Y. 1994), *aff'd*, 71 F.3d 1067 (2d Cir. 1995). In the Second Circuit's affirmation of *Soysset Woodbury Road*, the court notes that the privilege has generally only been applied in criminal cases but that it could be extended on a case by case basis to civil proceedings, such as forfeitures which may be considered "quasi-crimnal." *See Soysset Woodbury Road*, 71 F.3d at 1070. The Seventh Circuit chose not to allow the privilege in a civil case, but made clear the decision was based on the particular facts of the proceeding. *See Ryan v. Commissioner of Internal Revenue*, 568 F.2d 531 (7th Cir. 1977).

Looking at the prevailing law, the Court finds there is no general anti-marital fact privilege in a federal civil case. Under the circumstances of this particular case, the Court declines to extend an anti-marital fact privilege to Defendants.

Accordingly, IT IS ORDERED that Defendants' November 20, 1998 Motion for Protective Order Regarding the Depositions of Wayne Evans and Madelyn Evans is DENIED. IT IS FURTHER ORDERED that the parties shall set a mutually agreeable time to conduct the depositions, which shall be completed by *February 26, 1999.*

Dated this 12 day of January, 1999.

/s/ William D. Browning
WILLIAM D. BROWNING
Senior United States District Judge

APPENDIX C

[Filed Feb. 23, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 97-555-TUC-WDB

TOHONO O'ODHAM NATION,
Plaintiff,

v.

WAYNE and MADELYN EVANS, WILLIE and JANE DOE GILBERT, DAWSON and JANE DOE RILEY, HUNTINGTON CONSTRUCTION, INC., WESTERN PACIFIC CONSTRUCTION, INC., VOICE OF GOD RECORDINGS, INC., HAROLD MARCONDA, LINDA and JOHN DOE MARTIN, JEREMY EVANS, and DANIEL EVANS,
Defendants.

ORDER

Pending before the Court is Defendant Wayne and Madelyn Evans' February 11, 1999 Motion for Stay Pending Writ of Mandamus.

On November 20, 1998, Defendants Evans filed a Motion for Protective Order, seeking to block the taking of their depositions. The basis for this request was that both Defendants intended to claim a Fifth Amendment privilege against self-incrimination with respect to all questions other than their names, and further believed they had an anti-marital fact privilege available to them. The Court found that the deposition should go forward because De-

fendants must claim their Fifth Amendment privilege with respect to each question. Additionally, the Court found that there is no general anti-marital fact privilege in a federal civil case, nor does one apply in this specific case. In a January 12, 1999 Order, the Court denied the Motion for Protective Order, and ordered that the depositions must be conducted on or before February 26, 1999. The depositions are currently set for February 23 and 24, 1999.

On February 15, Defendants filed a Petition for Writ of Mandamus with the Ninth Circuit Court of Appeals. The Petition requests that the Ninth Circuit instruct this Court to allow Defendants to invoke an anti-marital fact privilege, which would preclude Plaintiff from requiring the Defendant spouses to testify against one another. Without addressing the propriety of mandamus or the probability of Defendants success on the merits, the Court acknowledges that Defendants may well suffer irreparable harm if required to disclose information later determined to be privileged. *See Admiral Ins. Co. v. United States Dist. Ct. for the District of Arizona,* 881 F.2d 1486, 1491 (9th Cir. 1989).

In light of the above, the Court will grant the request for a stay. The Court will further order that Defendants Evans file status reports on the writ of mandamus and notify the Court when it has been ruled on by the Ninth Circuit.

Accordingly, IT IS ORDERED that Defendant Wayne and Madelyn Evans' February 11, 1999 Motion for Stay Pending Writ of Mandamus is GRANTED. IT IS FURTHER ORDERED that the depositions of Wayne and Madelyn Evans are stayed until further order of the Court. IT IS FURTHER ORDERED that Defendants Evans shall file a status report on the writ of mandamus every

sixty (60) days, beginning *April 20, 1999*. IT IS FURTHER ORDERED that Defendants Evans shall notify the Court in writing within five (5) days of the Ninth Circuit's ruling on the Petition for Writ of Mandamus.

Dated this 19 day of February, 1999.

/s/ William D. Browning
WILLIAM D. BROWNING
Senior United States District Judge

[Filed Apr. 9, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
CIVIL MINUTES—GENERAL

April 8, 1999

No. CV-97-555-TUC-WDB

TOHONO O'ODHAM NATION

vs.

WAYNE EVANS, *et al.*

MOTION TO STAY/DEPOSITION SCHEDULING

Counsel state their positions to the Court.

IT IS ORDERED that the Motion to Stay [Doc. 168] is GRANTED, and the Motion to Lift Stay [Doc. 169] is DENIED. The depositions of Wayne and Madelyn Evans are stayed for a period of 60 days until the United States Supreme Court is in recess, at which time the stay will dissolve and this matter may come back before the Court for further hearing, depending upon the ruling of the Supreme Court

In the interim, all remaining depositions shall proceed with the exception of the damages expert depositions, which shall be stayed pending a hearing on the Motion for Summary Judgment. Motion for Extension of Time [Doc. 173] is GRANTED to the extent consistent with this Order. All discovery, other than the specific deposi-

tions which have been stayed, shall be completed within 60 days from the date of this Order.

Hearing on Motion for Summary Judgment is set for Tuesday, JUNE 8, 1999 at 9:00 a.m.

HON. WILLIAM D. BROWNING

Supreme Court, U.S.
FILED
JUN 2 1999
CLERK

No. 98-1756

In The

Supreme Court of the United States

WAYNE EVANS and MADELYN EVANS,
husband and wife,

Petitioners,

v.

TOHONO O'ODHAM NATION; WILLIE GILBERT; DAWSON RILEY and DAVINA RILEY; HAROLD MARCONDA; LINDA MARTIN and JACK MARTIN; JEREMY EVANS; DANIEL EVANS; HUNTINGTON CONSTRUCTION, INC.; WESTERN PACIFIC CONSTRUCTION, INC.; and VOICE OF GOD RECORDINGS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT TOHONO O'ODHAM NATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REVISED STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Respondent suggests that a more accurate statement of the Questions Presented is as follows:

1. Whether the court below, like all other courts which have decided the issue, properly concluded that the federal common law privilege against adverse spousal testimony (also referred to as the anti-marital fact privilege) applies only in criminal proceedings where life or liberty is at stake.

2. Whether the court below correctly concluded that in a federal question jurisdiction case, as opposed to diversity jurisdiction case, federal common law governs the application of privilege law.

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STATEMENT OF THE CASE

A. The Material Facts.

Respondent, the Tohono O'odham Nation (the "Nation"), is a federally recognized Indian tribe, which by legislative resolution established a Farming Authority (the "Farming Authority") to, among other things, commercially manage the Nation's agricultural resources, and generate profits from such operations for the Nation's benefit and related purposes. In December 1994, the Farming Authority hired Petitioner Wayne Evans ("Evans") to serve as its interim general manager. He later entered into written contract with the Farming Authority to serve as its general manager.

The complaint alleges that Evans, while serving as the general manager for the Farming Authority, engaged in a fraudulent scheme to misappropriate money from the Farming Authority that involved multiple forgeries, counterfeit invoices, the use of U.S. and private mail, and the use of interstate telephone communications. Using a forged contract, Evans engaged Huntington Construction, Inc. ("Huntington"), a company in which he had an interest and which, for all intents and purposes, he controlled to perform work for the Farming Authority. After hiding and lying about his interest in Huntington, Evans caused the Farming Authority to pay Huntington nearly $1.6 million for work that cost Huntington less than $300,000, thereby giving Huntington an unearned profit of approximately $1.3 million. Evans also gave Farming Authority money to Western Pacific Construction, Inc. ("Western Pacific"), another company in which Evans had an interest, for work and services that Western Pacific could not

have performed. Once in the hands of Huntington, the Farming Authority's money was then distributed at the direction of Evans directly to himself (or for his benefit), to his family members, to Western Pacific, to the Church of the Word of God, to Voice of God Recordings, Inc. ("Voice of God") and to others who performed no services for the Farming Authority. Evans caused $820,000 of the monies received by Huntington from the Farming Authority to be sent to Voice of God in Jeffersonville, Indiana. The Farming Authority learned of the $820,000 transfer to Voice of God, several days after it was made. Thereafter, Evans was terminated from his position with the Farming Authority.

Based on these facts, the Nation asserted: (1) federal and state RICO claims against Evans and Huntington (and others); (2) an unjust enrichment claim against Huntington and Western Pacific; (3) a conversion claim against Huntington, Evans, Western Pacific (and others); (4) a constructive trust claim against Huntington, Western Pacific, Evans (and others); (5) a breach of contract claim against Evans; and (6) a breach of fiduciary duty claim against Evans. Contrary to Petitioners' assertions in their statement of the case, the Nation has not asserted any claims directly against Madelyn Evans.

Under Arizona law, it is necessary to name the spouse of a party who has engaged in wrongdoing in order to obtain a judgment enforceable against their jointly owned community property. In Arizona, all property acquired during marriage (with certain exceptions not pertinent here) is presumptively community property, in which both spouses have an interest. *See* Ariz. Rev. Stat. Ann. § 25-211 (1973). Madelyn Evans was thus

named as a party because she is a necessary and proper party in a suit to "obtain and execute a judgment against community" property under Arizona law. *Flexmaster Aluminum Awning v. Hirschberg*, 173 Ariz. 83, 88, 839 P.2d 1128, 1123 (Ct. App. 1992). The Nation has not alleged that Madelyn Evans has done anything that would make her individually liable to the Nation.

B. The Proceedings and Decisions Below.

In September 1997, the Nation filed suit against defendants in the United States District Court in Tucson, Arizona. Several months later, the Nation amended its complaint to add additional parties and assert additional claims. The essence of the Nation's amended complaint is summarized in the preceding section. Federal court jurisdiction is based on federal question jurisdiction under 28 U.S.C. § 1331 and 18 U.S.C. § 1964.

The Nation noticed the depositions of defendants Wayne and Madelyn Evans. A few days before the depositions were scheduled, the Evanses moved for a protective order to excuse them from giving depositions on the grounds that they intended: (1) to assert their fifth amendment privilege against self incrimination as to every question asked of them after a request for their names; and (2) to assert the privilege against adverse spousal testimony (also referred to as the anti-marital fact privilege). In its opposition papers, the Nation pointed out that defendants cannot make a blanket assertion of their fifth amendment privilege, and that, under prevailing federal law, the privilege against adverse spousal testimony is not recognized in a federal civil case. At oral

argument on the Evanses' motion, the Nation also brought to the district court's attention cases holding that, like the fifth amendment privilege, the adverse testimony privilege does not create a blanket privilege. Rather, the privilege may only be asserted on a question-by-question basis.

The district court denied the Evanses' motion. The district court found that the federal common law on privileges governs "when jurisdiction is based on a federal question, as opposed to diversity." (Petitioners' App. B, p. 6a) The district court further concluded that the privilege against adverse spousal testimony "applies only to adverse testimony, and does not create a blanket privilege." (Petitioners' App. B, p. 6a) Finally, the district court held that, under prevailing federal law, there is no privilege against adverse spousal testimony "in a federal civil case." (Petitioners' App. B, p. 7a)

The Evanses filed a petition for writ of mandamus with the Ninth Circuit Court of Appeals, contending that the district court improperly denied their motion for a protective order because the court failed to recognize the privilege against adverse spousal testimony in a federal civil case. Thereafter, the district court granted the Evanses a stay of their depositions pending the Ninth Circuit's ruling on their petition for writ of mandamus. (Petitioners' App. C, p. 8a) A few weeks later, the Ninth Circuit concluded that the Evanses had "not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus" and denied the petition. (Petitioners' App. A, p. 1a)

By order dated April 9, 1999, the district court continued the stay of the depositions for 60 days to allow the Evanses to pursue a petition for writ of certiorari with this Court. (Petitioners' App. C, p. 11a)

REASONS FOR DENYING THE WRIT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SCOPE OF THE PRIVILEGE AGAINST ADVERSE SPOUSAL TESTIMONY HAS BEEN SETTLED BY THIS COURT AS WELL AS CIRCUIT APPELLATE COURTS.

A. The Privilege Against Adverse Spousal Testimony Does Not Apply In Federal Civil Cases.

The Evanses claim that the district court erred by failing to accept their assertion of the privilege against adverse spousal testimony in this civil case. The privilege has never been recognized in a federal civil case and, given this Court's policy that privileges should be narrowly construed because they block the judicial fact-finding function, there is no justifiable reason to expand the privilege.

Testimonial privileges of a witness are "governed by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience." Fed. R. Evid. 501. In enacting Rule 501, "Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis. . . .' " *Trammel v. United*

States, 445 U.S. 40, 47 (1980) (quoting 120 Cong. Rec. 40,891 (1974)). When deciding privilege issues, this Court has recognized that privileges must be narrowly construed because they interfere with the search for the truth. *United States v. Nixon*, 418 U.S. 683, 710 (1973) (Privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth."). As a result, this "Court has been disinclined to exercise [its] authority expansively" to interpret privileges. *University of Pennsylvania v. Equal Employment Opportunity Comm'n*, 493 U.S. 182, 189 (1990).

Relying on *Stein v. Bowman*, 38 U.S. 209 (1839), the Evanses contend (Petition at 9) that there has been a long-established rule recognizing the privilege against adverse spousal testimony in a federal civil case. *Stein* did not specifically address the privilege issue. Rather, in that case, the Court addressed the rule of spousal disqualification, which provided "that neither husband nor wife can be a witness *for or against the other*." *Id.* at 222 (emphasis added). The rule of law applicable at the time also prevented a party from being "a witness in his own case" because of the perceived strong temptation to give perjured testimony. *Id.* at 219.

Moreover, the rule stated in *Stein* was limited in *Funk v. United States*, 290 U.S. 371, 376 (1933). There, this Court explained that the basic rule in *Stein* preventing a spouse from giving testimony for or against her spouse had been modified "partially by legislation and partially by judicial construction." This Court noted that Congress had subsequently enacted legislation "that no witness should be excluded from testifying in any civil action, with certain exceptions, because he was a party to or interested in the issue tried." *Id.* at 377. The exclusion of a spouse from

giving testimony for or against his or her spouse "was based upon his or her interest in the event." *Id.* at 380. In short, *Funk* abolished the spousal testimonial disqualification in federal courts to permit a spouse of a defendant to testify on his behalf, reasoning that the beliefs "to admit such testimony is against public policy because it would endanger the harmony and confidence of the marital relations, and, moreover, would subject the witness to the temptation to commit perjury" had been rejected. *Id.* at 381. *Funk* did not actually confront the privilege against adverse spousal testimony.

There does not appear to be any reported federal court case which has applied the privilege against adverse spousal testimony in a civil case. The privilege has been applied only in criminal cases, which have accorded great significance to the connection between the criminal aspect of the case and the spousal testimony. In *Hawkins v. United States*, 358 U.S. 74 (1958), in deciding that the non-witness spouse held the privilege, this Court explained that the rule of law regarding adverse spousal testimony has "refused to pit wife against husband or husband against wife in *a trial where life or liberty is at stake* . . . ," thereby limiting application of the privilege to a criminal proceeding. *Id.* at 77 (emphasis added). In his concurring opinion, Justice Stewart echoed the limited application of this privilege to criminal cases when he explained that "it has now become simply a privilege of the *criminal defendant* to prevent his spouse from testifying against him." *Id.* at 81 (emphasis added).[1]

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[1] The *Hawkins* case also explained that the "rule stated in *Stein v. Bowman* was followed by this and other federal courts

Several years after the *Hawkins* decision, the privilege against adverse spousal testimony was criticized by this Court in *Trammel*, a criminal case, where the Court quoted Professor Wigmore's statement that the privilege is the " 'merest anachronism in legal theory and an indefensible obstruction to truth in practice.' " 445 U.S. at 45. Noting that "[n]o other testimonial privilege sweeps so broadly" this Court explained that "[t]he ancient foundations for so sweeping a privilege have long since disappeared." *Id.* at 51, 52. Rather than abolish the privilege entirely, however, the Court limited its holding to the issue before it – the right of one spouse to use the privilege to prevent testimony by the willing spouse. The Court modified the privilege, holding that only the witness spouse, not the non-witness spouse, could invoke the privilege against adverse spousal testimony. *Id.* at 53 ("[W]e conclude that the existing rule should be modified so that the witness-spouse alone has the privilege to refuse to testify adversely; the witness may neither be compelled to testify nor foreclosed from testifying.").

Although the issue presented here is slightly different, the discussion and analysis in *Trammel* illustrates that the privilege against adverse spousal testimony *is limited to criminal cases and has no bearing in civil cases*. For example, the Court framed the issue before it as follows: "whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the

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until 1933 when this Court decided *Funk v. United States*" and that the *Funk* case left open the question "which allowed either spouse to exclude adverse testimony by the other." 358 U.S. at 76.

need for probative evidence in the administration of *criminal justice." Id.* at 51 (emphasis added). This Court further explained that unlike the marital communications privilege which protects private communications, the spousal privilege seeks to "exclude evidence of *criminal acts* and of communications made in the presence of third persons" in order to preserve marital harmony. *Id.* at 51 (emphasis added). The *Trammel* opinion also refers to the privilege against adverse spousal testimony as applying to *"an accused." Id.* at 48, 49, 51, 52 (emphasis added). Finally, the opinion notes that the "modification – vesting the privilege in the witness-spouse – furthers the important public interest in marital harmony without unduly burdening legitimate *law enforcement needs." Id.* at 53 (emphasis added).

All Circuit Courts of Appeal and District Courts that have addressed the issue since the decisions in *Hawkins* and *Trammel* have limited the privilege against adverse spousal testimony to criminal cases. Recognition of the marital privilege only in criminal cases was found to be the rule in the Seventh Circuit in *Ryan v. Commissioner of Internal Revenue*, 568 F.2d 531 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). Relying on *Hawkins*, the court affirmed a decision of the Tax Court holding in contempt of court a taxpayer husband and wife who, on the grounds of the martial privilege, refused to answer interrogatories propounded by the Commissioner of the IRS. The court concluded that the privilege had been recognized only in criminal cases and that the Supreme Court had preserved the privilege in trials where life or liberty was at stake. Moreover, the court relied on "Proposed Rule of Evidence 505, which was adopted by the Supreme

Court but rejected by Congress" as providing guidance in interpreting the privilege because the Proposed Rule "would have restricted the privilege to criminal cases." 531 F.2d at 543.[2] The court in that case also concluded that "no independent policy reasons" would justify extending the privilege in that case. 531 F.2d at 544.[3]

The Second Circuit also has refused to extend the privilege, observing that the "adverse spousal testimony privilege has traditionally been limited to criminal cases."

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[2] Limiting the privilege against adverse spousal testimony to criminal cases is consistent with the Supreme Court's proposed rule of evidence regarding husband-wife privileges. Proposed Federal Rule of Evidence 505 "would have codified the Hawkins rule" [*Trammel*, 445 U.S. at 47] and would have restricted the privilege to criminal proceedings [*see* Proposed Rule 505(a) ("An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.")]. Although this rule was not adopted, it provides guidance for interpreting the scope of the privilege against adverse spousal testimony. According to the Advisory Committee Notes accompanying Rule 501, "the action of Congress should not be understood as disapproving any recognition . . . of the enumerated privileges contained in the Supreme Court rules."

[3] Petitioners contend that the *Ryan* case should be disregarded because it "preceded *Hawkins*, and in *Hawkins* this Court rejected most of the policy arguments *Ryan* rested upon." (Petition at 14) That simply is not true because *Hawkins* was decided in 1958 and *Ryan* was decided in 1977. In fact, *Ryan* based its decision upon *Hawkins*. Petitioners also attack the *Ryan* decision because of a statement in the case that the fifth amendment "applies only to criminal cases." A thorough reading of the case reveals that the gist of that statement was that the privilege against self-incrimination extends to instances where the witness has reasonable cause to fear prosecution from answering certain questions.

United States v. Premises Known as 281 Soysset Woodbury Rd., 71 F.3d 1067 (2d Cir. 1995). That case involved a civil forfeiture proceeding that arose out of a drug trafficking conviction. The court rejected the argument that the privilege should apply in a civil forfeiture dispute because forfeiture is quasi-criminal. *Id.* at 1070. The Petitioners here criticize this case, contending that its holding is based upon secondary sources that cite no authoritative case law for the criminal/civil dichotomy regarding the privilege against adverse spousal testimony. They misread this case because the decision, in large part, followed *Trammel* and its reasoning.

The Court of Appeals for the District of Columbia has also noted that the privilege is limited to criminal cases. *Securities and Exch. Comm'n v. Lavin*, 111 F.3d 921, 925 (D.C. Cir. 1997) (The privilege against adverse spousal testimony "allows a spouse called as a witness against his or her spouse in a criminal proceeding to refuse to testify.") (citing *Trammel*, 445 U.S. at 53). District courts have consistently adhered to the same rule. *See In re Shur*, 225 B.R. 295, 300 (E.D.N.Y. 1998) ("The anti-marital facts privilege is limited to criminal matters 'where one spouse is a party and the other spouse is called to testify.' "); *Abbott v. Kidder, Peabody & Co.*, 1997 WL 337228, *4 (N.D. Ill. 1997) ("The federal common law marital privilege against adverse spousal testimony applies only in criminal cases."); *Engelmann v. Nat'l Broadcasting Co.*, 1995 WL 214500, *2 (S.D.N.Y. 1995) ("[T]he privilege against adverse spousal testimony is only applicable in criminal actions and hence has no bearing in this civil action."). In federal criminal cases where the privilege has been applied, courts have cautiously stated that the privilege is

limited to criminal cases. *See, e.g., In re Grand Jury Matter,* 673 F.2d 688, 691-92 (3d Cir.) ("We have concluded that in Trammel the Supreme Court had 'decided that the privilege against adverse spousal testimony remains a viable principle of federal law and only modified the privilege by vesting it solely in the testifying spouse.' As we then noted, 'The crux of the privilege is that a person may not be forced to be a witness against his or her spouse in a criminal proceeding.' ") (citations omitted), *cert. denied,* 459 U.S. 1015 (1982); *United States v. Van Drunen,* 501 F.2d 1393, 1396 (7th Cir.) (explaining that the privilege against adverse spousal testimony may excuse a spouse from testifying against her spouse "in a criminal case"), *cert. denied,* 419 U.S. 1091 (1974).[4]

The decisions by the federal courts below are unanimous. The Petitioners stand alone in their position that the privilege against adverse spousal testimony applies in a federal civil case. Under their suggested approach, both spouses would be able to escape testifying in a civil case where one spouse is party because state community property law requires that both be named in the suit. The primary wrongdoer – here Evans – would be able to escape giving deposition testimony. Such a result would run afoul of controlling Supreme Court law and the search for truth in the quest to administer justice. *See Trammel,* 445 U.S. at 50-51 ("Testimonial exclusionary rules and privileges contravene the fundamental principle that

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[4] Petitioners have criticized the district court decisions that have concluded that the privilege applies only in criminal cases as having no real authoritative support. These decisions find support in and are consistent with *Hawkins* and *Trammel.*

'the public . . . has a right to every man's evidence.' As such, they must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good of transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.") (citations omitted).

B. Even In Criminal Cases, The Privilege Against Adverse Spousal Testimony Does Not Insulate A Spouse From Giving Testimony Because The Privilege Is Unavailable Unless The Anticipated Testimony Is In Fact Adverse To The Non-Witness Spouse.

Petitioners suggest that the privilege against adverse spousal testimony ought to completely insulate them from giving *any* testimony. This argument, that the spousal testimony privilege protects the very act of testifying, overlooks the significance of adversity in determining the scope of the privilege. Neither *Trammel*, nor the Circuit Appellate Courts that have addressed the adverse spousal testimony privilege, have suggested that the privilege is so broad as to protect any testimony at all by a spouse. As stated in *Trammel*, the rule applies only to testimony that is adverse to the spouse's penal interests. *Id.* at 53 (explaining that the rule gives the witness-spouse "a privilege to refuse to testify adversely"). *Trammel* did not create a blanket privilege from giving any testimony.

Moreover, Circuit Appellate Courts have consistently recognized that the privilege only applies to testimony that is adverse to the other spouse's penal interest. *See, e.g., United States v. Cauwenberghe*, 827 F.2d 424, 431 (9th

Cir. 1987) (refusing to recognize the spousal privilege where the witness failed to demonstrate that the testimony was adverse to her spouse's penal interests), *cert. denied*, 484 U.S. 1042 (1988); *In re Martenson*, 779 F.2d 461, 464 (8th Cir. 1985) (holding that the privilege is "not available unless the anticipated testimony would in fact be adverse to the non-witness spouse."); *In re Grand Jury Proceedings*, 664 F.2d 423, 429-430 (5th Cir. 1981) (similar), *cert. denied*, 455 U.S. 1000 (1982). In *In re Grand Jury (Malfitano)*, 633 F.2d 276, 280 n.6 (3d Cir. 1980), the court acknowledged that "the [spousal testimony] privilege is not absolute: it does not shield all testimony nor does it bar procedures that may protect the spouse from the effects of the testimony."

A prerequisite to raising the privilege requires that the testimony be adverse. It must be offered against a spouse who is a party in the case and bear harmfully on that spouse's penal interests. Courts have not applied the privilege to prevent testimony on objective facts having no effect on the party spouse. Consequently, even in criminal cases, blanket assertions of the privilege are not permitted because the privilege is not a general one. As with asserting the fifth amendment privilege against self-incrimination, the privilege against adverse spousal testimony "must be asserted as to particular questions" and, consistent with the district court's holding in this case, cannot be made as a blanket assertion against giving any testimony at all. *Cauwenberghe*, 827 F.2d at 431.

II. EVIDENCE RULE 501 MANDATES THE APPLICATION OF THE FEDERAL COMMON LAW OF PRIVILEGES WHERE, AS HERE, JURISDICTION IS BASED ON FEDERAL QUESTION.

Petitioners urge that review is also necessary to establish that state privilege law applies in cases where state law claims are raised along with federal question claims. Federal Rule of Evidence 501 and cases following it have uniformly rejected this notion, making review unnecessary here.

Rule 501 of the Federal Rules of Evidence provides in pertinent part that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law." The Advisory Committee Notes explain that "state privilege law will generally apply in diversity cases" and, conversely, "[i]n nondiversity jurisdiction civil cases, federal privilege law will generally apply."

Courts have invariably found that in cases such as this, involving federal question jurisdiction and pendent state law claims, the federal law of privileges applies. *See Hancock v. Dobson*, 958 F.2d 1367, 1373 (6th Cir. 1992) ("Since the instant case is a federal question case by virtue of the appellant's section 1983 claim, we hold that the existence of pendent state law claims does not relieve

us of our obligation to apply the federal law of privilege."); *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 671 F.2d 100, 103 (3d Cir. 1982) ("[I]n federal question cases the federal common law of privileges applies."); *United States v. State of Illinois*, 148 F.R.D. 587, 588, 590 (N.D. Ill. 1993) ("[A] state law privilege is limited in a case in federal court governed by substantive federal law"; "It is therefore the Federal Common Law of privilege that is supreme."); *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 459 (N.D. Cal. 1978) ("[I]n federal question cases where pendent state claims are raised the federal common law of privileges should govern all claims of privilege raised in the litigation."). Other recent cases addressing the issue have likewise held that the federal law of privilege controls in federal question jurisdiction cases "even if the witness-testimony is relevant to a pendent state law count which may be controlled by a contrary state law privilege." *Hancock v. Hobbs*, 967 F.2d 462, 467 (11th Cir. 1992) (per curiam); *accord Spencer Sav. Bank v. Excell Mortgage Corp.*, 960 F.Supp. 835, 836 (D.N.J. 1997) ("[T]he federal law of privileges governs" where a "plaintiff has asserted both federal and state law causes of action."); *Brunt v. Hunterdon County*, 183 F.R.D. 181, 185 (D.N.J. 1998) (similar).

Leading commentators on evidence have reached the same conclusion. Weinstein explains that "in federal question cases where pendent state claims are raised the federal common law of privileges should govern all claims of privilege raised in the litigation." 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 501.02[3][b] (Matthew Bender 2d ed. 1997). Wright & Graham also assert that the most

appropriate approach is to conclude that because the provision requiring federal courts to look to state privilege law in certain circumstances is an exception to the general rule that federal privilege law applies in federal court, "courts should always follow the federal rule when the same evidence is relevant to both a state law and federal claim." 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE, EVIDENCE § 5434 at 862 (1980).

There is logic to applying the rule that federal privilege law governs in a federal question case, where pendent state law claims are also asserted, because federal law favors admissibility and disfavors privileges not constitutionally based. *Wm. T. Thompson Co.*, 671 F.2d at 104. Indeed, this Court has cautioned federal courts to create or expand federal privileges only with extreme reluctance. *University of Pennsylvania*, 493 U.S. at 189; *Nixon*, 418 U.S. at 710 n.18. A strict construction of privileges is appropriate in federal question cases because "privileges obstruct the search for truth," *Branzburg v. Hayes*, 408 U.S. 665, 690 n.29 (1972), and "contravene the fundamental principle that the 'public . . . has a right to every [person's] evidence.' " *University of Pennsylvania*, 493 U.S. at 189; *accord Trammel*, 445 U.S. at 50 ("Privileges must be strictly construed and tolerated only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.").

Federal courts may, however, "resort to state law analogies for the development of a federal common law of privileges in instances where the federal rule is unsettled." *Wm. T. Thompson Co.*, 671 F.2d at 104. Federal law

on the privilege against adverse spousal testimony has been settled in the federal courts – a result that makes it unnecessary to look to or adopt Arizona law on the issue.

Nevertheless, Petitioners urge this Court to adopt the approach to consider state law privileges used by the district court in *Smith v. Alice Peck Day Memorial Hosp.*, 148 F.R.D. 51 (D.N.H. 1993). Contrary to Petitioner's argument, *Smith* is entirely consistent with the approach described above. That case involved seven state law claims, three federal claims, and jurisdiction was based on both diversity and federal question. Consistent with Rule 501 and federal cases on choice of law with respect to privileges, the court concluded that "in cases such as this one, where jurisdiction is based on both diversity of citizenship and the presence of federal claims, federal common law controls any claim of privilege." *Id.* at 53. The question before the court was not whether state or federal privilege law applied, but whether "a federal court should recognize a state [quality assurance privilege applicable to hospitals] as a matter of federal common law." *Id.* The court refused to adopt the "quality assurance privilege . . . even if the state courts would apply the privilege in such cases." *Id.* at 56.

In the instant case, there is no reason to stray from settled federal law and apply Arizona law with respect to the privilege against adverse spousal testimony. Nor should Arizona law be substituted for the federal rule governing this privilege in light of unanimous federal law to the contrary.

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons, the Court should deny the petition for writ of certiorari.

Respectfully Submitted,

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No. 98-1756

IN THE
Supreme Court of the United States

WAYNE EVANS and MADELYN EVANS, husband and wife,
Petitioners,

v.

TOHONO O'ODHAM NATION; WILLIE GILBERT; DAWSON RILEY and DAVINA RILEY; HAROLD MARCONDA; LINDA MARTIN and JACK MARTIN; JEREMY EVANS; DANIEL EVANS; HUNTINGTON CONSTRUCTION, INC.; WESTERN PACIFIC CONSTRUCTION, INC.; and VOICE OF GOD RECORDINGS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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IN THE

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TOHONO O'ODHAM NATION; WILLIE GILBERT; DAWSON RILEY and DAVINA RILEY; HAROLD MARCONDA; LINDA MARTIN and JACK MARTIN; JEREMY EVANS; DANIEL EVANS; HUNTINGTON CONSTRUCTION, INC.; WESTERN PACIFIC CONSTRUCTION, INC.; and VOICE OF GOD RECORDINGS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

The Brief in Opposition to Certiorari ("Brief"), presents no valid reason that this Court ought not review this case.

1. The issue is squarely raised by Petitioner Madelyn Evans, as well as her husband Wayne. Acknowledging that it sued not only Petitioner Wayne Evans but also his wife Madelyn, Respondent contends that it sued her only to obtain jurisdiction for a judgment against the entire

marital community. Brief p. 2. However, Respondent does not disagree with our statement that its development of evidence made "apparent that the Nation is pursuing her as a participant in allegedly fraudulent misconduct." Petition p. 3. Whether Respondent may ultimately seek or obtain a judgment against Madelyn directly or as part of the marital community, it is apparent that in this case Wayne Evans could raise the privilege to avoid testifying against her, even if only to avoid possible later criminal problems for her. More importantly for the appropriateness of this case for certiorari, there is virtually no question that Respondent seeks a judgment holding Wayne Evans liable for numerous criminal acts. If this Court accepts this case and reaffirms the existence of the marital privilege in a civil case, Madelyn Evans can raise the privilege against testifying against her husband Wayne. There is virtually no record infirmity to reaching that issue.

2. *Whether an anti-marital fact privilege is claimable* in toto *or case-by-case, while a subordinate point on the merits, does not make this case un-certworthy.* Respondent notes that in deciding this matter, the District Court observed that any privilege covers only testimony that is "adverse," and does not create a blanket privilege. Brief p. 4. It then argues the merits of this point, Brief pp. 13-15. If Respondent means to imply that there would not be such adverse testimony in this case, the Court is reminded of the seven different criminal offenses the Respondent has included in its complaint. Pet. p. 4. And, as we reiterate above, the Respondent is developing proofs of such crimes against both Petitioners. This case squarely presents the issue of an anti-marital fact privilege whether or not it must be asserted question-by-question. The District Court refused to allow even that kind of privilege.

If Respondent wishes to convince this Court that the District Court's ruling was as narrowly based as that, it is mistaken. The ruling, rather, was that "[T]here is no general anti-marital fact privilege in a federal civil case. Under the circumstances of this particular case, the Court declines to extend an anti-marital fact privilege to Defendants." Pet. App. 7a. While any consideration on the merits probably should include whether the privilege, which is intended to bolster marital harmony, provides blanket protection or must be invoked on a question-by-question basis, the District Court did not rest its decision on that point. Rather, it held, in clear contravention to *Stein v. Bowman*, 38 U.S. (13 Pet.) 209 (1839) that there was no civil-case privilege.

3. The case also conflicts with this Court's rejection of "balancing test privileges." Respondent's attempt to portray the decision below as limited to the minor point of the privilege applying question-by-question overlooks that the decision also concluded alternatively that such a privilege might be invoked in some cases, but not others, and not in this case. That suggestion, based upon similar holdings from other cases, *see* Pet. App. 7a, contradicts at least three cases of this Court rejecting the use of a balancing test to determine privileges. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); *Jaffee v. Redmond*, 518 U.S. 1 (1996); *Upjohn Co. v. United States*, 449 U.S. 383 (1981). It is these basic points, squarely conflicting with *Stein* and the three above-cited cases, that compel a grant of certiorari.

4. The issue is more substantial; and much less thoughtfully dealt with in other cases, than Respondent's discussion of the merits indicates. Respondent seeks to downplay the importance of the issue by invoking the rubric that privileges are, in general, disapproved and

narrowly circumscribed where allowed; and by mischaracterizing the case law on the subject.

Respondent's general invocation of the principles of *United States v. Nixon*, 418 U.S. 683 (1973), and other cases, that privileges must be narrowly construed, is both undisputed and insufficient. For, as best exemplified by *Trammel v. United States*, 445 U.S. 40 (1980), this Court has reaffirmed the existence of the privilege notwithstanding direct recognition of the general rule of circumspection for privileges.

Respondent seeks to convince this Court that there is a body of lower court cases, adverse to Petitioner, well reasoned, and derived from cases of this Court, sufficient to leave the issue alone. That is just wrong.

The only lower court case, or secondary authority, that contained any real discussion of the issue was *Ryan v. Commissioner of Internal Revenue*, 568 F.2d. 531 (7th Cir. 1977). Its failings have been noted. Pet. p. 13. Its primary holding was that, contrary to the above-cited cases of this Court, a balancing-test privilege applied. Its alternative logic, that there was no civil-case privilege, turned out to be contrary to the subsequent *Trammel* case, *supra*, particularly in its reliance upon the disapproved Federal Evidence Rule 505.[1] This Court in *Trammel* observed that the process of adopting the Federal Rules of Evidence, particularly Congress' rejection of Rule 505, in favor of Congressionally-drafted general rule 501, supported the *Trammel* court's reaffirmation of the privilege,

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[1] The Petition erroneously referred, Pet. p. 14 and n. 5, to *Hawkins v. United States*, 358 U.S. 74 (1958), instead of to *Trammel, supra*, as the case decided after both *Ryan* and the adoption of the Federal Rules of Evidence, which case dealt (albeit without citing *Hawkins*) with arguments raised in *Ryan*. *Trammel* was the intended reference.

albeit only at the claim of the spouse-witness. *Ryan* is not only not a basis for denying review, it prompts review of this case, which relied at least in part upon *Ryan*.

Respondent also distorts the import of *United States v. Premises Known as 281 Syosset Woodburry Road*, 71 F.3d 1067 (2d Cir. 1995), when it says, Brief p. 11, that the case in large part followed *Trammel* and its reasoning. But just as discussed in the Petition, pp. 12-17, *Syosset* cited numerous cases and secondary sources other than *Trammel*, for its statement that the privilege did not apply to civil cases. 71 F.3d at 1070. It then proceeded to demonstrate that statement to be *dictum*, saying that "On the facts presented here, however, we decline to reach that question," *ibid.*, because the case before it did not present possible testimony of one spouse against another. Indeed, after citing *Trammel* solely to demonstrate the purpose of the privilege—marital harmony—and not for limitation to criminal cases, the Second Circuit said "The relevant distinction in the case before us is not whether the action is criminal or civil. Mrs. Caminola would be equally unable to avail herself of the adverse spousal testimony privilege if this were a criminal prosecution against her." *Id.* at 1071. *Syosset* not only didn't follow *Trammel* and its reasoning to withhold the privilege in civil cases, it didn't decide that at all.

Cases newly cited here by respondent, *Securities Exchange Commission v. Lavin*, 111 F.3d 921 (D.C. Cir. 1997); *In re Grand Jury Matter*, 673 F.2d 688, 691-692 (3d Cir. 1982) and *United States v. Van Drunen*, 501 F.2d 1393, 1396 (7th Cir. 1974), do not hold or decide that no privilege is claimable in a civil case. Rather, they simply state that the privilege *does* apply in a criminal case.

Respondent argues that the various cases criticized by Petitioners, as setting forth *dictum* that no privilege arises

in a civil case, are supported by *Hawkins* and *Trammel*. But *Hawkins* and *Trammel* do not reach such a holding. Instead, they simply use criminal-case language in deciding the existence and scope of the privilege in criminal cases. They do not in any way disapprove an anti-marital fact privilege in a civil case.

5. Respondent, like the Court below, would write out of existence Evidence Rule 501's clause pertaining to privilege for claims arising out of state law. Respondent gives a token quote of Rule 501's dictate that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with state law." It then proceeds to argue for expungement of that portion of the rule whenever a civil action has both state and federal claims, acknowledging that the court in this case so held, and arguing that all other courts have "invariably found that in cases such as this, involving federal question jurisdiction and pendent state law claims, the federal law of privileges applies." Brief p. 15. Not only should that not be the rule, Respondent's own authorities do not support it. *See* string cite and parenthetical quotes, Brief pp. 15, 16, some of which say that, and others not. Indeed, *Abbott v. Kidder, Peabody & Co.*, 1997 WL 337228 (N.D. Ill. 1997), cited by Respondent, Brief p. 11, concludes that although in cases of dual-based claims federal law should prevail, state law should be taken into account in determining that federal privilege. And in *Mercado v. Division of New York State Police*, 989 F. Supp. 521 (S.D.N.Y. 1998), the District Court turned to a state privilege for a federal claim, balancing the state interest, the privilege, against the federal interest in obtaining evidence for the particular evidence. Petitioners asked the lower court in

this case to do that. The decision did not deal with the issue.

Respondent cites learned treatises which do say that for cases involving both federal and state claims, the federal law of privilege should override that of the state, for the entire case. But such contentions are not logical applications of this portion of Rule 501. Regardless whether there are numerous cases or other authorities which approve of ignoring the plain language of a statute or rule, this Court cannot shirk its duty to interpret and apply that language. *E.g., Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, —— U.S. ——, 1998 WL 85319 (1998). Not to do so for this congressionally-enacted rule is tantamount to allowing to go unreviewed a case that holds a statute unconstitutional.

Further, the reasoning of the Respondent's cited treatises, Brief pp. 16, 17, that the rule favoring admissibility, and of circumspection in recognizing and defining privileges, arising out of federal law should trump state concerns for privileges, is much weaker, if it is to be applied at all to a marital privilege. This Court has historically given extraordinary deference to the states' roles in matters of marriage and the family; and it has done so in pervasive areas of federal jurisdiction and procedure. "As a general matter, [t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Boggs v. Boggs*, —— U.S. ——, 117 S.Ct. 1754, 1764 (1997), *quoting In re Burrus*, 136 U.S. 586, 593, 594 (1890). This lower court decision should not be allowed cavalierly to subjugate that cornerstone proposition of federalism to a rule that if any civil case has a federal claim, federal privilege law completely determines the matter.

6. Conclusion. The clearest error in the Brief of Respondent is the contention, Brief p. 6, that *Stein, supra*, "did not specifically address the privilege," and its contention that only a rule of spousal disqualification to be a witness was dealt with in that case. Reading the *Stein* opinion clearly disproves that assertion. In *Stein*, the Court said:

> "The rule does not seem to be entirely settled . . . It is, however, admitted in all the cases, that the wife is not competent, except in cases of violence upon her person, directly to criminate her husband; *or* to disclose that which she has learned from him in their confidential intercourse." 38 U.S. at 222 (emphasis supplied).

The *Stein* court made clear in this passage that it was recognizing both the confidential communication privilege *and* the anti-marital fact privilege. And while *Funk v. United States*, 290 U.S. 371 (1933) recognized that the "witness competency" underpinnings of *Stein* have changed, there is no doubt that *Stein* was based on the "marital harmony" considerations that have been the underpinnings of this Court's recent anti-marital fact privileges. *E.g., Trammel v. United States*, 445 U.S. 40 (1980); *Hawkins v. United States*, 258 U.S. 74 (1958). The *Stein* court said:

> "The rule which protects the domestic relations from exposure, rests upon considerations connected with the peace of families. . . .
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> . . . .
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> This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest

> and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence. 38 U.S. at 222, 223.

With the modern-day anti-marital privilege thus deriving from the above-described considerations of marital harmony, the privilege is no longer a "relic" of antiquated legal and social views about the status of females. Instead, it is clearly premised upon the view that the marriage relation requires this protection to improve odds for successful marriages. That is both a salutary, and gender-neutral, rule.

Based upon a stretching of lower court cases' holdings and statements, Respondent would have this Court refuse review of a case which conflicts as much as can be with *Stein*; which involves an issue that goes to the root of the social order; which involves an issue given great significance both by this Court in previous opinions, and by Congress in its rejection of a differing rule about this privilege. This Court must speak upon this issue.

Respectfully submitted,

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